

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-5028/31

To be argued by
JOHN P. CAMPBELL

United States Court of Appeals FOR THE SECOND CIRCUIT

In re
THE DUPLAN CORPORATION, DUPLAN FABRICS, INC.,
Debtors.

CHEMICAL BANK, THE FIRST NATIONAL BANK OF CHICAGO,
NORTH CAROLINA NATIONAL BANK AND SECURITY
PACIFIC NATIONAL BANK,

Appellants,

UNITED STATES TRUST COMPANY OF NEW YORK, Successor In-
denture Trustee for the 5½% Convertible Subordinated Debentures of
THE DUPLAN CORPORATION, due February 1, 1994

Appellant,

THE ROCHESTER JOINT BOARD AMALGAMATED CLOTHING
WORKERS OF AMERICA, AFL-CIO,

Appellee,

ALFRED P. SLANER, REORGANIZATION TRUSTEE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT UNITED STATES TRUST
COMPANY OF NEW YORK, As Successor
Indenture Trustee

JAN 5 1978

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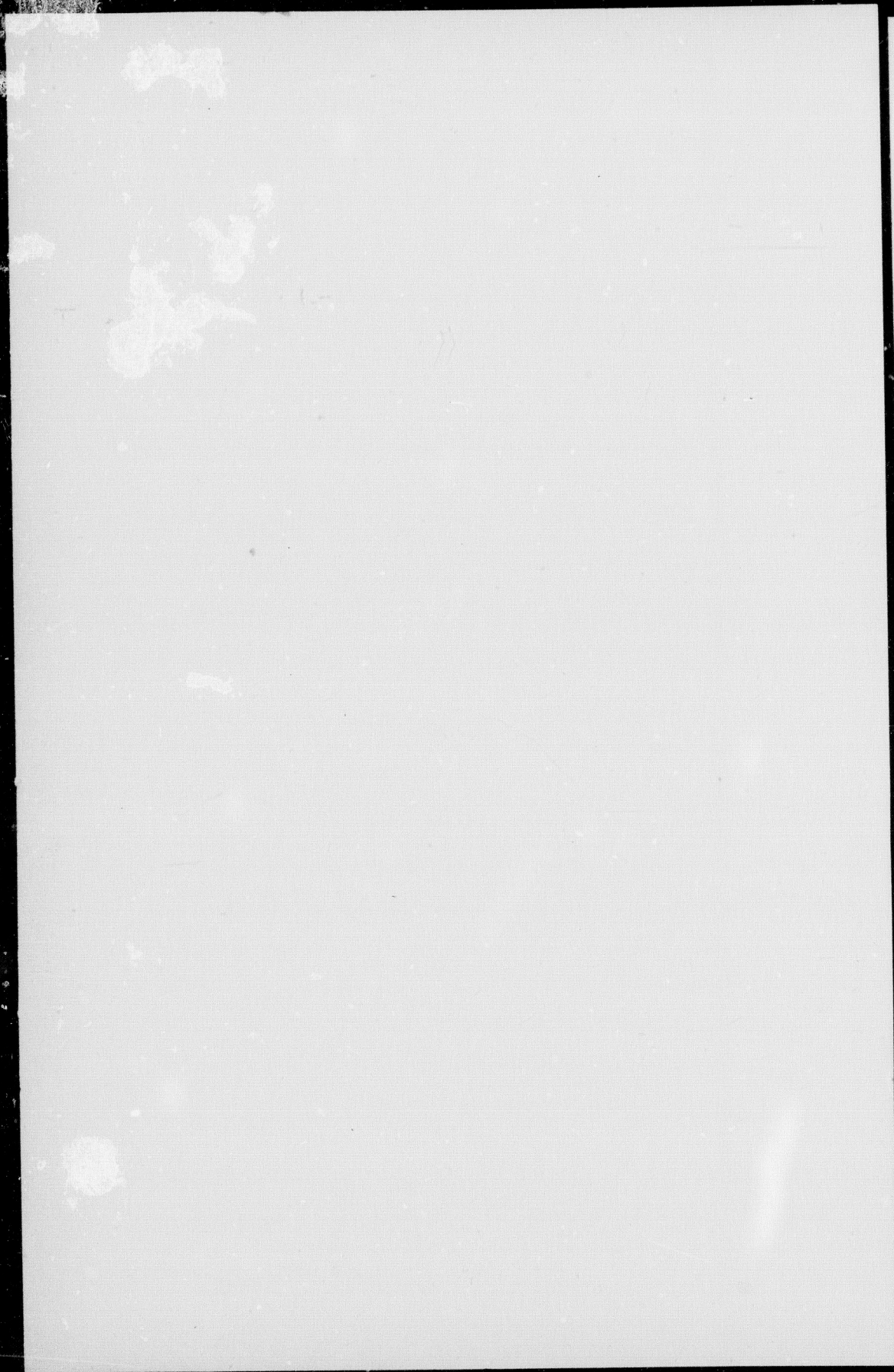


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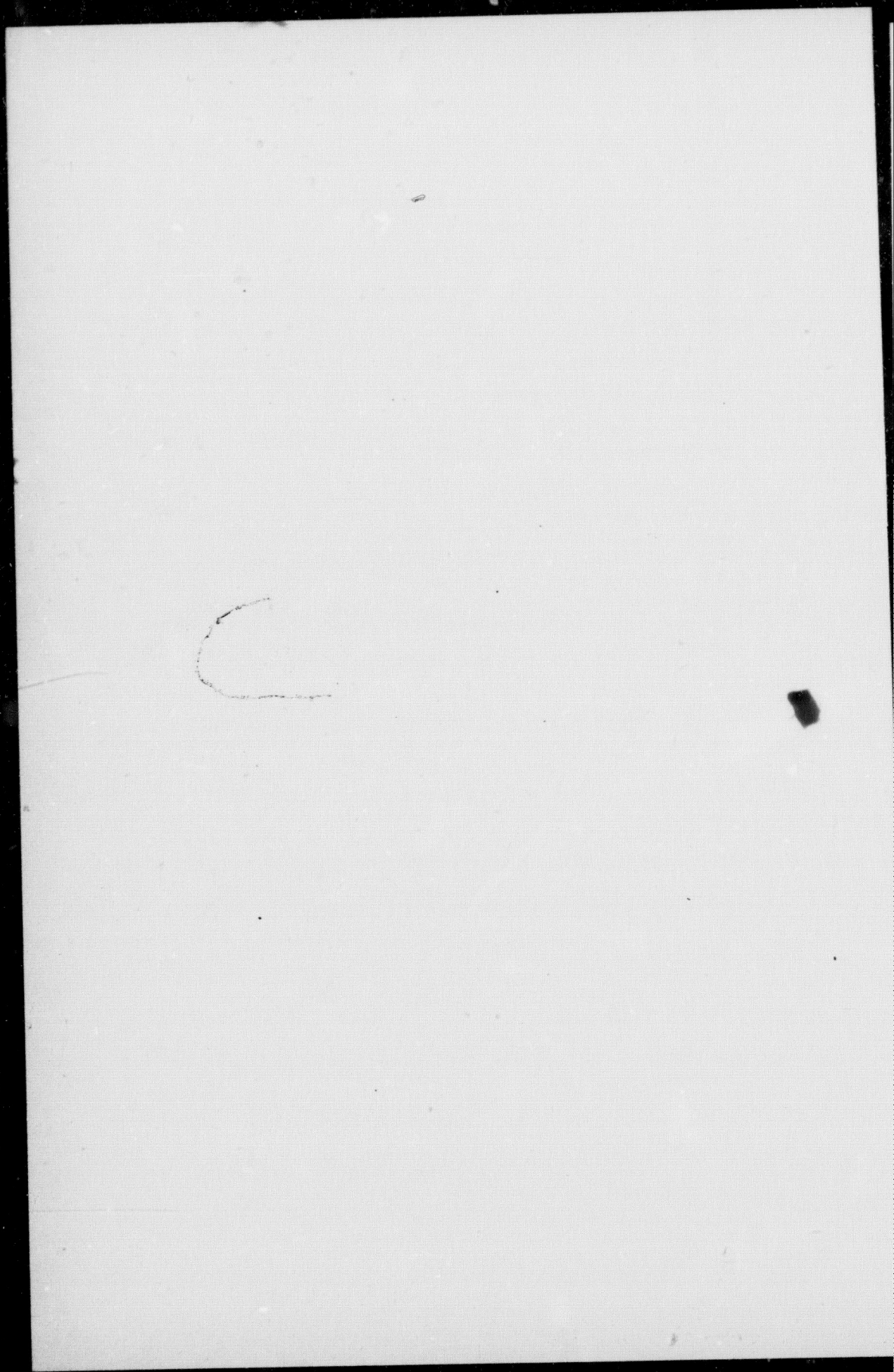
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CHEMICAL BANK, THE FIRST NATIONAL BANK OF CHICAGO,
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Appellants,

UNITED STATES TRUST COMPANY OF NEW YORK, Successor Indenture Trustee for the 5½% Convertible Subordinated Debentures of THE DUPLAN CORPORATION, due February 1, 1994,
Appellant,

THE ROCHESTER JOINT BOARD AMALGAMATED CLOTHING
WORKERS OF AMERICA, AFL-CIO,
Appellee,

ALFRED P. SLANER, REORGANIZATION TRUSTEE,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT UNITED STATES TRUST COMPANY OF NEW YORK, As Successor Indenture Trustee

Preliminary Statement

Appellant United States Trust Company of New York, successor Indenture Trustee (the "Indenture Trustee") under the February 1, 1969 Indenture (the "Indenture") of The Duplan Corporation ("Duplan"), for the 5½% convertible subordinated debentures (the "Debentures") due

February 1, 1994; and appellants Chemical Bank, The First National Bank of Chicago, North Carolina National Bank and Security Pacific National Bank (the "Banks"), creditors of Duplan, appeal from so much of an order (the "Order") of the United States District Court for the Southern District of New York, by Honorable Kevin Thomas Duffy, entered October 12, 1977 (A 136-137),* insofar as it approved and authorized Article XV D of the Agreement (the "Agreement") (A 74-75) between Rochester Button Company ("Rochester"), a division of Duplan, and The Rochester Joint Board Amalgamated Clothing Workers of America, AFL-CIO (the "Union"), upon an application June 30, 1977 (the "Application") (A 26-32) by Alfred P. Slaner as Reorganization Trustee (the "Reorganization Trustee") for an order approving the execution of the Agreement.

Article XV D of the Agreement (the "Severance Pay Provision") (A 74-75), provides: (i) if Rochester's operations at any of three plants are liquidated prior to February 1, 1979, Rochester shall pay each employee separated as a result a sum equal to the amount he would have been paid had he not been so separated, computed on the basis of an average work week of forty hours for the remainder of the Agreement; and (ii) if any one or more of such plants is liquidated after February 1, 1979, then the parties shall negotiate the amount of severance pay, and if the parties are unable to agree, then the severance pay shall be determined by arbitration. The Severance Pay Provision (A 74-75) creates a potential post petition administration claim of approximately \$5,644,000 as of April, 1978 (A 118).

The Indenture Trustee and the Banks promptly raised objections to the Severance Pay Provision (A 122-127, 129-135). The Indenture Trustee and the Banks objected to the Severance Pay Provision because it is onerous and

* References "A" are to the pages of the Joint Appendix.

burdensome, and because it jeopardizes Duplan's reorganization by creating intolerable potential administration claims which could exhaust substantially all of Duplan's assets (A 122-127, 129-135).

The Reorganization Trustee and the Union then asked the District Court for permission to comply with all the aspects of the Agreement except the Severance Pay Provision subject to further proceedings before the District Court, without prejudice to rights to renegotiate the Agreement if its execution in entirety were not approved ultimately by the District Court (A 95-98). On September 2, 1977, the District Court signed an order entered on September 6, 1977 (A 99-100) authorizing the Reorganization Trustee to comply with the provisions of the Agreement, with the exception of the Severance Pay Provision, subject to further proceedings on the Severance Pay Provision to be held on September 27, 1977.

At the September 27, 1977 proceedings (A 119-135), counsel for the Reorganization Trustee indicated that the Severance Pay Provision is onerous and burdensome (A 128). The Indenture Trustee and the Banks, creditors representing approximately 80% in amount of Duplan's debt, requested that the District Court take testimony on the Severance Pay Provision (A 129-130, 133-135). The District Court denied that request (A 135). On October 12, 1977, the Order was entered in the District Court approving the execution of the entire Agreement, including the Severance Pay Provision (A 136-137). At proceedings on October 19, 1977 (A 138-141) on another matter, the District Court stated that it approved the Severance Pay Provision because it was similar to an "evergreen" provision which would not be changed (A 140-141). The District Court then refused again to take testimony on the Severance Pay Provision (A 141).

The Indenture Trustee and the Banks bring this appeal pursuant to Title 11, United States Code, Section 47a (Sec-

tion 24a of the Bankruptcy Act), as aggrieved parties, in order to contest the District Court's approval of the Severance Pay Provision of the Agreement (A 73-75) by the Order entered October 12, 1977. The Order has not been reported.

Issues Presented for Review

1. Did the District Court err by refusing to take testimony regarding the Severance Pay Provision of the Agreement?

2. Did the District Court abuse its discretion by failing to exercise sound business judgment when it approved a collective bargaining agreement containing the onerous and burdensome Severance Pay Provision which may jeopardize Duplan's reorganization?

Statement of the Case

The Parties

Duplan is a diversified textile and apparel company which, through its subsidiaries and divisions, is or has been engaged in the manufacture and sale of double knit and warp knit fabrics, textured yarns, brassieres, buttons, children's sleepwear, and ladies underwear (A 26-27). On August 31, 1976, Duplan and its wholly owned subsidiary Duplan Fabrics, Inc. filed petitions under Chapter XI, Section 322 of the Bankruptcy Act, for an arrangement of their debts (A 1). Thereafter, by the October 5, 1976 order of the Honorable John P. Galgay, Bankruptcy Judge, the motion of the Securities and Exchange Commission was granted to transfer those Chapter XI cases to Chapter X (A 3). By the October 13, 1976 order of the District Court, Alfred P. Slaner was appointed Trustee in Reorganization of Duplan and Duplan Fabrics, Inc. (A 4).

The Rochester division of Duplan, with headquarters in

Rochester, New York and plants and sales offices situated throughout the United States and Canada, manufactures and sells buttons and sells machines which attach belt loops to jeans (A 27).

The Union is recognized by Rochester as the exclusive bargaining agent of its production and maintenance employees for wages, hours and working conditions at Rochester's Akron, Rochester and Wellsville, New York plants (A 27-28). The most recent agreements between Rochester and the Union covered the period June 1, 1974 through June 1, 1977 (A 28). One such agreement covered employees at the Rochester and Wellsville plant (A 48-56); the second covered employees at the Akron plant (A 34-47).

Appellant United States Trust Company of New York, a New York banking corporation, is the successor Indenture Trustee for the approximately \$19,000,000 currently outstanding convertible subordinated Debentures (A 89).

Appellants Chemical Bank, The First National Bank of Chicago, North Carolina National Bank, and Security Pacific National Bank are bank creditors of Duplan in the unpaid principal amount of approximately \$38,000,000, purportedly secured by liens, pledges and security interests upon substantially all of the fixed assets of Duplan and its subsidiaries and the capital stock of Duplan's subsidiaries (A 101-102). The Banks presumably will be substantial unsecured creditors of Duplan because of the expected deficiency in collateral values of Duplan's assets (A 102).

The Agreement

Prior to the Application, the Agreement had been ratified by the Union employees at the three plants covered by the Agreement (A 28). The Agreement covers the period from June 1, 1977 through September 30, 1980 (A 28).

The Agreement differs from the collective bargaining agreements which expired June 1, 1977 in several material ways. The most significant difference, the Severance Pay Provision, is separately discussed. Other improvements negotiated by the Union in the Agreement are summarized as follows:

(1) Wages will increase across-the-board 30¢ per hour on June 1, 1977, January 30, 1978 and October 1, 1978; a 20¢ per hour increase will become effective on October 1, 1979 (A 67-68). The expired contracts provided only annual 40¢ per hour raises (A 36, 50).

(2) A cost of living adjustment effective on October 1, 1978 will provide a maximum 15¢ per hour increase, consisting of a 5¢ per hour increase for each full 1% increase in the Consumer Price Index ("CPI") (1967 base year) above 7½% between April 1, 1977 and April 1, 1978 (A 68). An additional maximum 10¢ per hour cost of living adjustment will be provided on October 1, 1979 consisting of 5.3¢ for each full 1% increase in the CPI above 6% between April 1, 1978 and April 1, 1979 (A 68). There are no comparable provisions in the expired contracts (A 36, 50).

(3) To comply with the Employee Retirement Income Security Act, Rochester may be required to contribute additional amounts to the Union pension plan for past services by employees (A 75). The regular contribution schedule has been carried over from the expired contracts (A 40, 53, 75).

(4) One additional paid holiday has been added for Union employees (A 38, 52, 72).

(5) Vacation eligibility has been liberalized to provide by 1979 for 4 weeks vacation after 15 years of service rather than the previous 18 years required (A 37, 51,

70-71). The pay period upon which the rate of vacation pay is calculated has been liberalized (A 37, 51, 70-71).

(6) The Agreement liberalizes job rules (A 78-84) and increases (A 81) bereavement leave provisions (A 76) and seniority rights (A 65-67) over those in the expired contracts (A 34-36, 48-50, 54, 65-67).

The Severance Pay Provision

Both the expired contracts and the Agreement have identical provisions stating that (a) Rochester will not relocate the three covered plants without the consent of the Union (A 39, 53, 73-74), (b) Rochester will not import, produce or job foreign buttons unless Rochester has full employment (A 39, 53, 74) and (c) Rochester agrees and warrants not to liquidate operations at the three covered plants during the term of the contracts (A 39, 53, 74).

The fourth provision of Article XV, the Severance Pay Provision, differs materially in the Agreement from the expired contracts. The expired contracts for the Rochester/Wellsville plants provide the following:

In the event that operations of the Employer [Rochester] are liquidated at the [covered] plants during the term of this Agreement, then and in that event the Employer agrees to pay each employee separated as a result of such liquidation, a sum equal to the amount he would have been paid had he not been so separated, said sum to be computed on the basis of an average work week of forty (40) hours for the remainder of the contract period (A 53).

The Severance Pay Provision of the Agreement contains substantially the same provision but makes it applicable to liquidations occurring prior to February 1, 1979 (A 74). The Agreement then adds a second subparagraph with re-

spect to liquidations occurring on or after February 1, 1979, such that

[t]he parties shall negotiate the amount of severance pay due each employee. In the event that the Employer and the Union are unable to mutually agree upon the amount of severance pay to be paid to such employees, then and in that event, the amount of the severance pay shall be determined by an arbitrator selected from a panel proposed by the American Arbitration Association in accordance with the Association's rules and procedures and the determination of the Arbitrator shall be final and binding. In establishing the amount of severance pay due each employee, the Arbitrator shall consider the age and length of service of each employee and the employer's above stated intention not to liquidate its Rochester, Wells-ville and Akron, New York Facilities (A 74-75).

After the Reorganization Trustee filed the Application, the Indenture Trustee submitted on July 13, 1977 a counter-order which would approve the Agreement in all respects, except for the Severance Pay Provision (A 87-88). At that time, the Banks objected to the Severance Pay Provision (A 95-96).

As a result of objections of the Indenture Trustee and the Banks, the Reorganization Trustee presented a letter August 25, 1977 to the District Court (A 95-96) and a proposed order to enable the Reorganization Trustee to comply with the Agreement, with the exception of the Severance Pay Provision, subject to review in later proceedings (A 97-98). The District Court signed that order on September 2, 1977 (A 99-100), and scheduled proceedings on the Severance Pay Provision for September 27, 1977 (A 100).

Counsel to the Reorganization Trustee stated at the September 27, 1977 proceedings that the Severance Pay Provi-

sion is onerous and burdensome (A 128). Counsel for appellants then requested that the District Court take testimony regarding the Severance Pay Provision (A 129-30, 134-35). The Court declined to do so (A 135). Counsel to appellant Banks raised the issue that during the negotiations on the Severance Pay Provision, Rochester and the Union intended only that the provision provide severance pay if Rochester moved its production facilities to a different region, but that the effect of the language of the provision would require the payment of severance pay even if any of the plants were closed down for economic reasons and its operations discontinued, or if Duplan were liquidated in bankruptcy proceedings (A 124-126).

Rochester has 174 employees who would be covered by the Agreement (A 103). Each employee earns approximately \$11,000 per annum or an aggregate of approximately \$1,900,000 per annum and \$6,400,000 over the life of the Agreement (A 103). Accordingly, if Duplan is not capable of reorganization and must be liquidated, or the Reorganization Trustee determines to liquidate Rochester, or Duplan is adjudicated a bankrupt, substantial administration claims in the amount of unearned wages remaining to be paid during the life of the Agreement could result, if the liquidation occurs before February 1, 1979 (A 118). If liquidation occurs on or after February 1, 1979, there is no way presently to calculate the amount of severance pay which would have to be paid, because the Agreement leaves that amount to further agreement between Rochester and the Union, and, failing such agreement, to arbitration (A 75).

If severance pay would become due under the Severance Pay Provision, such amounts would have to be paid as administration expenses before pre-administration claimants could receive distributions.

Duplan's statement of operations for the ten month period ended July 31, 1977 (A 107-115), reflects that

Duplan and its subsidiaries have operated at a consolidated loss of \$355,000 (A 104); Rochester, the subject of the Agreement, has had declining operating profits and for such ten month period reflected net profits of \$141,000 on \$10,000,000 of sales (A 104).

To date the Reorganization Trustee has not filed any report concerning the investigation of Duplan's property, liabilities, financial conditions and reorganizability pursuant to Section 167 (a) of the Bankruptcy Act, 11 U.S.C. § 567(a) (A 104). Until that report is filed, the creditors of Duplan shall not have an expression of the Reorganization Trustee's views as to whether Duplan can be reorganized or as to the nature and scope of its continuing lines of business if reorganized (A 104-105). Without that report, no one can begin to predict whether Duplan would generate sufficient income to pay an administration claim of the magnitude which could be created by the operation of the Severance Pay Provision (A 104-105). Because there is no indication as to when or if Duplan's reorganization proceedings may terminate, there is no way to predict whether a severance pay claim will become due during the reorganization proceedings or afterwards. There is also no way to predict the maximum amount of severance pay claims which could accrue after February 1, 1979.

Although the Reorganization Trustee's counsel stated at the September 27, 1977 proceeding that the Severance Pay Provision is an "onerous provision and a burdensome provision" (A 128), the District Court refused the request of the Indenture Trustee and the Banks to take testimony on the provision (A 135). The District Court granted the Reorganization Trustee's Application and signed the Order October 5, 1977, which was entered October 12, 1977 (A 136-137). This appeal is taken from the Order.

POINT I

The District Court committed reversible error in refusing to take testimony on the Severance Pay Provision.

We have not discovered that either this Court or any other circuit has decided whether or not the District Court must take testimony in summary proceedings within a Chapter X corporate reorganization, upon application by a reorganization trustee to obtain the court's approval for the reorganization trustee to enter into a new collective bargaining agreement with a labor union representing the debtor's employees, when creditors of the debtor contest the application. We submit that testimony should be required to be taken in such circumstances and should have been taken below.

Without taking any evidence, the court below summarily approved the Reorganization Trustee's new contract which could create some \$5,644,000 (A 118) of administration expenses upon liquidation of the Rochester operations (A 122). Counsel for appellants also raised questions of fact concerning the intention of the parties to the Agreement about the meaning of the Severance Pay Provision, and urged the court to take testimony in light of the dispute as to the facts and in view of appellants' belief that the inclusion of the Severance Pay Provision could jeopardize the reorganization of Duplan (A 122-127, 129-135).

None of the appellants objected to the inclusion of substantial wage increases and other benefits contained in the Agreement. However, all appellants objected to the inclusion of the Severance Pay Provision, in view of the declining profitability of Rochester, reduced to a marginal operation, and because of the lack of information concerning the impact of the Severance Pay Provision on Duplan's reorganization. The appellants raised issues of fact at the

September 27 proceedings which contradicted assertions of the Union and the Reorganization Trustee about the meaning and impact of the Severance Pay Provision (A 121-135).

Because such issues of fact were raised by creditors, the District Court should have taken testimony on the issues raised. The Court also erred in characterizing the Severance Pay Provision as an "evergreen provision," because the provision requiring the Union and Rochester to negotiate or arbitrate severance pay terms for any liquidation after February 1, 1979 is a new term which leaves open the amount of severance pay which could be awarded and removes control over that determination from the jurisdiction of the court. By failing to hold a hearing on those points, the court below committed reversible error in denying appellants due process of law in the consideration of the issues they raised in Duplan's reorganization proceedings. The District Court denied appellants their right to have a hearing on the most important issue to have arisen to date in Duplan's proceedings and did not follow established precedent in summary proceedings in a bankruptcy case.

The District Court exercised summary jurisdiction, rather than plenary jurisdiction, in regard to the Application concerning questions arising between Duplan and its creditors in the course of administration of Duplan's estate. *Katchen v. Landy*, 382 U.S. 323, 327 (1966); *Taylor v. Voss*, 271 U.S. 176, 181 (1926). The District Court exercised summary jurisdiction in supervision of the Reorganization Trustee in the administration of Duplan. *U.S. Fidelity Co. v. Bray*, 225 U.S. 205, 217 (1912). Because the court has exclusive jurisdiction over the assets of the debtor in reorganization and can deal with all claimants, the court's summary jurisdiction is amplified. 5 Moore's Federal Practice ¶ 38.30[3], at 223 (2d ed. 1977).

This appeal raises the question of what minimum process must be observed in granting the approval of a contract (and, in addition, shows that the Severance Pay Provision is onerous and burdensome and should not have been allowed in these circumstances).

The nature of summary proceedings (including reorganizations [Section 102 of the Bankruptcy Act, 11 U.S.C. § 502 (1970)]) determines the procedure that must be followed.

By appellants' raising objections to the Application and contesting the assertions of the Reorganization Trustee, the proceedings concerning the Severance Pay Provision became a contested litigation. These are not technically Adversary Proceedings under Part VII of the Rules of Bankruptcy Procedure. See Advisory Committee's Note, Rule 101, Rules of Bankruptcy Procedure (defining the word "proceeding" as a "litigated matter arising within a [bankruptcy] case during the course of administration of an estate.") These are contested summary proceedings.

While summary proceedings are intended to provide prompt and effective administration and settlement of an estate within a limited period (*Bailey v. Glover*, 21 Wall. 342, 346 (1874), *U.S. Fidelity Co. v. Bray*, 225 U.S. at 218), the parties still are entitled to present defenses, and "to present evidence, oral and documentary, cross-examine witnesses, and otherwise participate in the judicial hearing or trial essentially as though the proceeding were plenary." 5 Moore's Federal Practice ¶ 38.30[3], at 224.2 (2d ed. 1977). Accord, 2 Collier on Bankruptcy ¶ 23.02[2], at 440 (14th ed. 1976). The distinguishing procedural characteristic of summary proceedings (as opposed to plenary proceedings) is that summary proceedings usually are carried out in a quicker and less formal manner than an ordinary suit. Formal pleadings may be dispensed with. 2 Collier on Bankruptcy ¶ 23.02[2], at 440-41 (14th ed. 1976); *In re Midtown Contracting Co.*, 243 F. 56, 63 (2d Cir.), cert. denied, 245 U.S. 654 (1917). Such actions may be com-

menced by motions and affidavits. *See, e.g., First State Bank of Crook, Colo. v. Fox*, 10 F.2d 116, 117 (8th Cir. 1925).

Procedural informality in summary proceedings does not permit abandonment of due process:

The hearing may be brief and less formal than the ordinary trial; but notice and hearing are generally necessary to satisfy the requirement of due process. 2 Collier on Bankruptcy ¶ 23.02[2], at 441 (14th ed. 1976).

The District Court permitted colloquy among counsel for some of the parties on the Severance Pay Provision, but no evidence was taken. There was no attempt to reach minimum hearing standards necessary to satisfy "due process" requirements. Measured by the standards of Rule 52(a) of the Federal Rules of Civil Procedure, the District Court's failure to make findings of fact upon which it could base a decision, after substantial issues of fact were raised, was error. *See, e.g., Lemelson v. Kellogg Co.*, 440 F.2d 986, 988 (2d Cir. 1971); *Klein v. Rancho Montana De Oro, Inc.*, 263 F.2d 764, 768 (9th Cir. 1959).

Rule 52(a) of the Federal Rules of Civil Procedure is applicable to the review of findings of fact in bankruptcy proceedings. *Thompson v. England*, 226 F.2d 488 (9th Cir. 1955). Under Section 102 of Chapter X, 11 U.S.C. § 502 (1970), the provisions of Chapters I to VII inclusive (dealing with bankruptcy) are applicable to Chapter X proceedings if not inconsistent. By virtue of that section and Section 114 of Chapter X, 11 U.S.C. § 514 (1970), the jurisdiction of the reorganization court to deal with the assets of the debtor and to determine controversies with respect thereto devolves from § 2a(7) of the Bankruptcy Act, 11 U.S.C. § 11a(7) (1970), which empowers courts of bankruptcy (including reorganization courts) to determine controversies concerning estates of bankrupts.

Rule 914 of the Rules of Bankruptcy Procedure applies portions of the rules in Part VII, dealing with Adversary Proceedings, to contested matters in cases not otherwise governed by the Rules of Bankruptcy Procedure. Rule 914, Rules of Bankruptcy Procedure. The Advisory Committee's Note to Rule 914 makes clear the need for the bankruptcy court to observe due process requirements:

The elemental requisites of due process must be afforded all parties to a dispute determined in the bankruptcy court. Litigation of a particular dispute, although not an adversary proceeding as defined in Rule 701, may become sufficiently serious and complicated to warrant the court's direction that the procedure be governed by rules that govern such proceedings.

It is clear that the dispute in the District Court concerning the Severance Pay Provision was "sufficiently serious and complicated" to warrant testimony. Issues of fact were raised. The potential impact on Duplan's reorganization is significant. Chapter X summary proceedings derive from summary proceedings conducted pursuant to Parts I through VII of the Bankruptcy Act and particularly from Section 2a(7). Procedural safeguards, such as F.R.C.P. 52(a), made applicable by Rule 914 to summary proceedings under Parts I-VII of the Bankruptcy Act, therefore are not inconsistent with the purposes of Chapter X summary proceedings and are applicable therein. Since the purpose of Chapter X is continuation of the debtor's business rather than liquidation [*Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 147 (1944)], controversies arising in the course of summary proceedings have greater impact on the outcome of reorganizations than do those in liquidations. Particular attention should be paid to procedural safeguards in reorganization proceedings, in this case concerning creation of an administration expense of some \$5,644,000 (A 118).

An evidentiary hearing in contested summary proceedings in corporate reorganizations under Chapter X is also required in equity. A reorganization court is, fundamentally, a court of equity. *Katchen v. Landy*, 382 U.S. at 327; *Pepper v. Litton*, 308 U.S. 295, 304 (1939). Reorganization courts recognize the need to take testimony in summary proceedings to assure that equity be done. *See, e.g., In re American Trust*, 426 F.2d 1059, 1061 (7th Cir. 1970); *In re Lyntex Corp.*, 403 F. Supp. 284, 285 (S.D.N.Y. 1975); *Tamasha Town & Country Club v. McAlester Construction Finance Corp.*, 252 F. Supp. 80, 85 n.2 (S.D. Cal. 1966). In the last case cited, the court noted:

Sometimes unsubstantial matters within summary jurisdiction are disposed of *ex parte* or on affidavits only with both sides present. *But where the proceeding is substantial and of an adversary nature*, issues must be framed and trial must be by examination and cross-examination of witnesses. 252 F. Supp. at 85 n.2 (emphasis added).

A Severance Pay Provision which could give rise to administration claims estimated at \$5,644,000 (A 118) against a debtor having \$17 million in assets and more than \$70,000,000 in outstanding claims against it is a substantial matter, the determination of which affects the reorganization of Duplan. In a matter of such importance "it is particularly important that the creditors . . . should have an opportunity to be heard as to approval of the contract. . . ." *In re Long Island Properties, Inc.*, 125 F.2d 206, 207 (2d Cir. 1942).

The proceedings conducted by the District Court failed to meet the minimal requirements for a "due hearing":

Due hearing implies a statement by the party plaintiff and an answer by the person defendant; while the procedure is informal [in summary proceedings], there must be an issue framed by what are practically

pleadings; on those pleadings a trial is based, and at such trial each party is entitled to examine the other, as well as to introduce witnesses. *In re Harry L. Sugarman, Inc.*, 3 F.2d 436 (2d Cir. 1924).

Accord, In re Schlesinger, 102 F. 117 (2d Cir. 1900); *Bradley v. St. Louis Terminal Warehouse Co.*, 189 F.2d 818, 824 (8th Cir. 1951).

When a significant issue is raised in summary proceedings, the court must conduct the type of hearing that will bring to light all the facts necessary for the court's exercise of discretion:

On the hearing, there must be recognition of the petitioners' rights to state objections; to cross-examine the witness . . . and to offer testimony of witnesses to substantiate their objections. *In re Community Neighbors, Inc.*, 287 F.2d 542, 543 (7th Cir. 1961).

Appellants, creditors representing more than 80% in amount of claims against Duplan, repeatedly requested that the District Court take testimony with respect to the Severance Pay Provision. Even if the District Court had discretion to approve an agreement containing the onerous Severance Pay Provision, creditors are entitled to have had testimony taken by the reorganization court. *See In re Rosenbaum Grain Corp.*, 83 F.2d 391, 394 (7th Cir. 1936). The District Court heard only colloquy from counsel, which is not a sufficient basis for sound exercise of discretion. *Prentice v. Boteler*, 141 F.2d 175, 176 (9th Cir. 1944).

Just as it is necessary to take testimony before a reorganization court may exercise its discretion on an application to reject a contract [*In re Tilco, Inc.*, 558 F.2d 1369, 1373 (10th Cir. 1977)], we submit that it is even more important to conduct a full hearing before exercising discretion concerning an unusual, significant contract which creates substantial administrative claims. In *Tilco*, the court had denied the trustee's request to reject a contract

after only receiving briefs and hearing arguments. The Court of Appeals remanded, stating:

The [reorganization] court acted without any hearing on the benefits or detriments to the bankruptcy estate that might result from contract rejection. The Trustee was entitled to an evidentiary hearing. The court, not the Trustee, must apply the "business judgment" test. It cannot do so without presentation of the facts and the making of findings subject to appellate review. *Id.*

We urge on behalf of appellant Indenture Trustee that while such summary jurisdiction is expeditious and economical in administration of a debtor's affairs, "these benefits may not override the safeguards against undue celerity or be used as arguments to deprive one of substantial rights. . . ." *In re Ira Haupt & Co.*, 289 F. Supp. 966, 972 (S.D.N.Y. 1968).

Section 206 of the Bankruptcy Act, 11 U.S.C. § 606 (1970), and Rule 10-210(a)(1) of the Rules of Bankruptcy Procedure grant an indenture trustee the "right to be heard" on all matters in a Chapter X reorganization, just as the Securities and Exchange Commission is granted the "right to be heard" when it moves to intervene pursuant to Section 208 of the Bankruptcy Act, 11 U.S.C. § 608 (1970), and Rule 10-210(c) of the Rules of Bankruptcy Procedure. That grant of the "right to be heard" is a statement of Congressional policy that indenture trustees, as well as the Securities and Exchange Commission, are charged with the protection of the interests of public investors. That duty would be rendered impossible to perform and the "right to be heard" would be meaningless without the right to cross-examine witnesses and to offer evidence. The District Court does not have the power to deny that right. *Securities and Exchange Commission v. Krentzman*, 397 F.2d 55, 58 (5th Cir. 1968).

The District Court well recognized the importance of the Agreement and the Severance Pay Provision issue (A 120). Nevertheless, the District Court denied requests of creditors to take evidence after several issues of fact were raised. We submit that the Court erred in approving the Agreement, with the Severance Pay Provision, without taking evidence. *In re Harry L. Sugarman*, 3 F.2d at 437. The District Court also erred when it referred to the Severance Pay Provision as an "evergreen provision." The Severance Pay Provision materially differs from prior severance pay provisions in Rochester's contracts with the Union (A 39, 53, 74-75). In the expired contracts, there was no provision for the amount of severance pay to be negotiated by Rochester and the Union or referred to an arbitrator. That determination by the District Court is clearly erroneous and is reversible under the standards set by Rule 60 of the Federal Rules of Civil Procedure. See *Thompson v. England*, 226 F.2d at 491. For these reasons, the Order should be reversed and remanded for the taking of testimony.

POINT II

The District Court abused its discretion by failing to exercise sound business judgment when it approved the collective bargaining agreement containing the onerous and burdensome Severance Pay Provision which may jeopardize Duplan's reorganization.

We do not find that this Court has ever decided whether or not the District Court can be reversed for abuse of discretion for failure to exercise sound business judgment by approval of a collective bargaining agreement which was entered into by a reorganization trustee and which contains an onerous and burdensome severance pay provision. We urge that the District Court can be reviewed and the Order should be reversed.

Counsel for the Reorganization Trustee stated that the Severance Pay Provision is "onerous" and "burdensome" (A 128).

This Court has recognized that pre-administration collective bargaining agreements may be rejected where equitable interests in reorganizations or arrangements outweigh the policy of the National Labor Relations Act and the Railway Labor Act prohibiting termination of collective bargaining agreements without prior negotiations. *Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO v. REA Express, Inc.*, 523 F.2d 164, 169 (2d Cir.) cert. denied, 423 U.S. 1017 (1975); *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*, 519 F.2d 698, 706 (2d Cir. 1975). In each case this Court held that an onerous and burdensome executory collective bargaining agreement may be disaffirmed and remanded to the District Court for findings as to whether the contract involved was onerous and burdensome. Whether a contract is onerous and burdensome is the accepted standard for rejection of executory contracts. *In re D. H. Overmyer Co.*, [1973-1975 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 65,439 (S.D.N.Y. 1974); *In re New York Investors Mutual Group, Inc.*, 143 F. Supp. 51, 54 (S.D.N.Y. 1956).

Since this Court can set aside executory contracts that are onerous and burdensome, the same equitable standard should guide the Court in review of a contract made by a reorganization trustee. Appellant does not question the judgment of the Reorganization Trustee in seeking the District Court's approval for the Agreement. That approval was necessary. While a reorganization trustee may have authority to make ordinary contracts to conduct a debtor's business, he does not have unlimited discretion. Appellant does question the business judgment exhibited. The authority granted to a trustee to operate the debtor's business does not contemplate entering into a modified

collective bargaining agreement that binds the debtor beyond the reorganization proceedings as the Agreement may do. *Local Joint Executive Board, AFL-CIO v. Hotel Circle, Inc.*, 419 F. Supp. 778, 791 (S.D. Cal. 1976). See also *In re Wil-Low Cafeterias, Inc.*, 111 F.2d 429, 431 (2d Cir. 1940) (in which this Court distinguished the trustee's discretion to enter into simple, ordinary contracts of hire and stated that the Court may have power to rescind even that type of executory contract). In *Chicago Deposit Vault Co. v. McNulta*, 153 U.S. 554, 561 (1894), the Supreme Court limited trustees' discretion in making new contracts and required court approval of contracts contemplating large outlays and extending beyond the period of the proceedings.

Exercise of particular care by the Court should be required in reviewing applications to undertake substantial administration obligations. If the trustee is authorized to make a contract, the Court usually cannot subsequently reject that contract where parties to the contract have acquired supervening rights. *In re Wil-Low Cafeterias, Inc.*, 111 F.2d 83, 86 (2d Cir. 1940); 8 Collier on Bankruptcy ¶ 3.15[11], at 209 (14th ed. 1976). See also *In re Roger Williams Building Corp.*, 99 F.2d 212, 217 (7th Cir.), cert. denied sub nom. *Provus Brothers, Inc. v. Holman*, 307 U.S. 635 (1939).

Even if special circumstances, such as impending financial disaster, might later permit rejection of the Agreement, rejection would cause substantial claims for administration expenses if any of Rochester's plants covered by the Agreement were liquidated. We believe that these considerations would have prompted the District Court to reject the Severance Pay Provision, if testimony had been taken.

The financial information and statements of Duplan and the Schedule of Comparative Costs of the Severance Pay Provision (A 33, 86, 107-118) indicate that administration claims of the size that could be created by the Sev-

erance Pay Provision would seriously impair Duplan. The purpose of Duplan's Chapter X proceedings is to preserve its value as a going concern until the Reorganization Trustee shall have had the opportunity to investigate its affairs, to advise the court, and to determine whether a plan of reorganization can be effected. *In re Realty Associates Securities Corp.*, 54 F. Supp. 787, 788 (E.D.N.Y. 1944). In that case, the court stated that in furtherance of that purpose of Chapter X, "the maintenance of the liquidity of the debtor's assets should be the paramount concern of the trustees, so that the position of the creditors, who have a prior claim to those assets, is not jeopardized." *Id.* at 788.

Thus, even if it were assumed that entering the Agreement could be considered continuation of the normal operation of the business of Duplan, the Agreement should not be entered if it would impair liquidity of Duplan. *Id.* at 788; *In re Business Supplies Corp. of America*, 72 Lab. Cas. ¶ 13,940 (S.D.N.Y. 1973) (which set standards for disaffirmance of collective bargaining agreements based on detriment to or economic drain on debtors); *See In re Klaber Brothers, Inc.*, 173 F. Supp. 83 (S.D.N.Y. 1959).

If the Agreement were executed without the Severance Pay Provision, the Union employees would still obtain an improved economic package over their expired contract (A 34-85). (See pp. 6-7 *supra*.)

If the Agreement were approved without that section of the Severance Pay Provision granting their Union the right to negotiate amounts of severance pay for post-February 1, 1979 liquidations or to have such amounts determined by arbitration, the Union employees would not be giving up any right they had under the expired contracts; the expired contracts contained no open-ended provision for damages (A 39, 53). If the Severance Pay Provision were not in the Agreement, the Union employees might not receive severance pay. However, as in *REA Express*,

523 F.2d at 169, it is a rare case when the financial distress of an enterprise in reorganization does not work hardship on its creditors, including those who render services to the debtor.

The Agreement without the Severance Pay Provision would still be generous. Duplan is undergoing reorganization. The Rochester division is now a marginally profitable operation. A trustee and the Court should not be so generous with the assets of a Chapter X estate by granting severance pay rights, where it seems probable that upon liquidation, claims of creditors and investors will not be satisfied. *In re Lyntex Corp.*, 403 F. Supp. at 288.

Additionally, the approval by the District Court of the Severance Pay Provision, which leaves open damages which could be assessed in case of liquidations occurring after February 1, 1979, was an abuse of discretion, in that an arbitrator's decision on the amount of severance pay due because of liquidation will oust the District Court from jurisdiction over a matter reserved to the Court. The Court, not arbitrators, should decide whether or not severance pay which could become due will be onerous and burdensome. *Bohack Corp. v. Truck Drivers Local U. No. 807, International Brotherhood of Teamsters*, 431 F. Supp. 646, 654 (E.D.N.Y. 1977). The Agreement would put future decisions as to amounts and validity of severance pay beyond the District Court's review. *Bohack*, 431 F. Supp. at 654-55; *Johnson v. England*, 356 F.2d 44, 51 (9th Cir.), cert. denied sub nom. *Johnson v. Raphael Weill & Co., Inc.*, 384 U.S. 961 (1966). We submit that the District Court should not relinquish to arbitrators power to fix awards which could become administrative claims against Duplan, and that it was an abuse of discretion for the District Court to do so.

For these reasons, the District Court's grant of authority to the Reorganization Trustee to enter into the

Agreement containing the onerous and burdensome Severance Pay Provision should be reversed; the Order should be vacated and the matter remanded for testimony to be taken.

Conclusion

1. The District Court erred in declining to take testimony concerning the Agreement, and particularly with regard to the Severance Pay Provision of the Agreement.

2. The District Court abused its discretion by failing to exercise sound business judgment and to act equitably in approving the Agreement.

3. The October 12, 1977 Order of the District Court should be reversed and remanded.

Respectfully submitted,

CURTIS, MALLET-PREVOST,
COLT & MOSLE
*Attorneys for United States
Trust Company of New York,
Successor Indenture Trustee
for the 5½% Convertible
Subordinated Debentures of
the Duplan Corporation due
February 1, 1994*

100 Wall Street
New York, New York 10005
212-248-8111

JOHN P. CAMPBELL
ROBERT G. ZACK
PRISCILLA LUNDIN
Of Counsel

January 5, 1978.

SUPPLEMENT

Statutes and Rules Involved.

11 U.S.C. § 11a(7) (Bankruptcy Act, Section 2a(7))

The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction.

11 U.S.C. § 47a (Bankruptcy Act, Section 24a)

The United States court of appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate

jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than \$500, an appeal therefrom may be taken only upon allowance of the appellate court.

11 U.S.C. § 502 (Bankruptcy Act, Section 102)

The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors", and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 128 of this Act, and the date of adjudication shall be taken to be the date of approval of a petition filed under section 127 or 128 of this Act except where an adjudication had previously been entered.

11 U.S.C. § 514 (Bankruptcy Act, Section 114)

Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not in-

consistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication.

11 U.S.C. § 606 (Bankruptcy Act § 206)

The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. The judge may, for cause shown, permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees.

11 U.S.C. § 608 (Bankruptcy Act, Section 208)

The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in a proceeding under this chapter. Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding, and shall be deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; but the Commission may not appeal or file any petition for appeal in any such proceeding.

Rule 52(a), Federal Rules of Civil Procedure

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility

of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 101, Rules of Bankruptcy Procedure

A bankruptcy case is commenced by filing a petition with the court by or against a person for the purpose of obtaining his adjudication as a bankrupt.

Advisory Committee's Note

A proceeding initiated by a petition for an adjudication under the Bankruptcy Act is designated a "bankruptcy case" for the purpose of these rules. The term embraces all the controversies determinable by the court of bankruptcy and all the matters of administration arising during the pendency of the case. This usage of the word "case" conforms to that employed in many provisions of the Bankruptcy Act. See, *e.g.*, §§ 22, 32, 39b, 40c, 42, and 59d. The word "proceeding" as used in these rules generally refers to a litigated matter arising within a case during the course of administration of an estate. See particularly Rule 703. The rule assumes the continuing applicability of the definition of "petition" in § 1(24) of the Act, but as used in the rules in this title the word refers to the document commencing a bankruptcy case. The place of filing a petition is more fully particularized in Rule 509.

Rule 914, Rules of Bankruptcy Procedure

In a contested matter in a bankruptcy case not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be

afforded the party against whom relief is sought. No responsive pleading is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons, complaint, and notice by Rule 704. In all such matters, unless the court otherwise directs, the following rules shall apply: 721, 725, 726, 728-737, 741, 742, 752, 754-756, 762, 764, 769, and 771. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable and relevant in a contested matter in a pending bankruptcy case may proceed in the same manner as provided in Rule 727 for the taking of a deposition before an adversary proceeding. For the purposes of this rule a reference in the rules in Part VII to adversary proceedings shall be read as a reference to contested matters. Notice of an order or direction under this rule shall be given when necessary or appropriate to assure to the parties affected a reasonable opportunity to comply with the procedures made applicable by the order.

Advisory Committee's Note

The elemental requisites of due process must be afforded all parties to a dispute determined in the bankruptcy court. Litigation of a particular dispute, although not an adversary proceeding as defined in Rule 701, may become sufficiently serious and complicated to warrant the court's direction that the procedure be governed by rules that govern such proceedings. Thus, the court may on occasion direct that the rules should govern a hearing on an objection to the trustee's report setting apart exemptions, *cf.* 1 Collier ¶ 6.22 (1960), or an objection to a proof of claim, see 3 *id.* ¶ 57.18 (1961). The rules in Part VII referred to in this rule are adaptations of the Federal Rules of Civil Procedure for the purpose of governing

procedure in adversary proceedings in bankruptcy cases. See the Note accompanying Rule 701 *supra*. Certain terms used in the Federal Rules of Civil Procedure have altered meanings when made applicable in bankruptcy cases by these rules. See Rule 902 *supra*. Another rule, Rule 121, makes certain of the rules of Part VII applicable in proceedings relating to a contested petition and proceedings to vacate an adjudication.

Rule 10-210(a)(1), Rules of Bankruptcy Procedure

The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a Chapter X case.

Rule 10-210(c), Rules of Bankruptcy Procedure

The Securities and Exchange Commission may, or if requested by the court shall, intervene in a Chapter X case. On the filing of a notice of intervention, the Commission shall be deemed a party in interest with the right to be heard on all matters in the case except that it may not appeal to the court of appeals from any order of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re

THE DUPLAN CORPORATION, DUPLAN FABRICS, INC.,

Debtors.

CHEMICAL BANK, THE FIRST NATIONAL BANK OF CHICAGO, NORTH
CAROLINA NATIONAL BANK AND SECURITY PACIFIC NATIONAL BANK,

Appellants,

UNITED STATES TRUST COMPANY OF NEW YORK, Successor Indenture Trustee
for the 5½% Subordinated Debentures of The Duplan Corporation, due February 1, 1994,

Appellant,

THE ROCHESTER JOINT BOARD AMALGAMATED CLOTHING
WORKERS OF AMERICA, AFL-CIO,

Appellee,

ALFRED P. SLANER, REORGANIZATION TRUSTEE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes
and says that he is over the age of 18 years. That on the 5th
day of January, 1978, he served two copies of
Brief of Appellant, United States Trust Company on
Zalkin, Rodin & Goodman, Esqs., the attorneys
for Appellants, Chemical Bank, et al.,
by delivering to and leaving same with a proper person in charge of
their office at 750 Third Avenue
in the Borough of Manhattan, City of New York, between
the usual business hours of said day.

David F. Wilson

Sworn to before me this

5th day of January, 1978.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472929
Qualified in New York County
Commission Expires March 30, 1979

UNITED STATES COURT OF APPEALS
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day of January, 1978, he served two copies of the
Brief of Appellant, United States Trust Company on
Chamberlain, D'Amanda, Bauman, Chatman & Oppenheimer
the attorneys for the Appellee, Rochester Joint Board
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorneys at
No. 1100 Cross Roads Building, 2 Main Street East, Rochester () N. Y.,
that being the address designated by them for that purpose upon
the preceding papers in this action.

David F. Wilson
.....

Sworn to before me this

5th day of January, 1978.

Courtney Johnson
Notary Public, State of New York
No. 41-5472920
Qualified in New York County
Commission Expires March 30, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re

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for Appellee, Reorganization Trustee
by delivering to and leaving same with a proper person in charge of
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in the Borough of Manhattan, City of New York, between
the usual business hours of said day.

David F. Wilson

Sworn to before me this

5th day of January, 1978.

Courtney Brown

COURTNEY L. BROWN
Notary Public, State of New York
No. 31-5473920
Qualified in New York County
Commission Expires March 30, 1978

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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for the 5½% Subordinated Debenture of The Duplan Corporation, due February 1, 1994,

Appellant,

THE ROCHESTER JOINT BOARD AMALGAMATED CLOTHING
WORKERS OF AMERICA, AFL-CIO,

Appellee,

ALFRED P. SLANER, REORGANIZATION TRUSTEE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes
and says that he is over the age of 18 years. That on the 5th
day of January, 1978, he served two copies of
Brief of Appellant, United States Trust Company on
Jerome Feller, Esq., the attorney
for Securities and Exchange Commission
by delivering to and leaving same with a proper person in charge of
his office at 26 Federal Plaza
in the Borough of Manhattan, City of New York, between
the usual business hours of said day.

David F. Wilson

Sworn to before me this

5th day of January, 1978.

Courtney Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472929
Qualified in New York County
Commission Expires March 30, 1978

SEE INSIDE FOR
SERVICE